Therefore, applying the principles of the above cases to the instant case, in my judgment, KGN being the equitable assignee has priority over the judgment creditor with respect to moneys due from Majlis Perbandaran Pulau Pinang, the subject matter of the garnishment order absolute.

Finally, regarding the suggestion of Encik Ajmer that the deed of assignment was not made bona fide and that it was executed to overcome the execution of judgment which the judgment creditors would subsequently enforce against the judgment debtors, I am satisfied, after giving due consideration, that this allegation was unfounded. It is unthinkable for KGN to collude with the judgment debtors in executing a 'bogus' deed of assignment, when on the facts it is clearly shown that KGN had assisted the second-named judgment debtor in providing a loan of $300,000 for him to implement his contract with Majlis Perbandaran Pulau Pinang. At any rate, it must be remembered that it requires a higher burden of proof on the judgment creditor to show mala fide.

In the result and for the reasons stated above, I allow this appeal with costs. The garnishment order absolute is hereby rescinded and all moneys held thereunder shall now be paid to KGN under the deed of assignment.

Appeal allowed.

Solicitors: *Raziah & Partners*; *Ajmer Singh Sandhu & Co.*

Reported by *PS Ranjan*

Grenek Sdn Bhd v Lew Wa Chow

HIGH COURT (PENANG) — SUIT NO 23-42-86
MOHAMED DZAIDDIN J
16 MARCH 1990

Civil Procedure — Order of committal — Defendant failing to obey order of court — Flaw in order of court — Effect of flaw on order of committal — Rules of the High Court 1980, O 45 r 5(1)

By a notice of motion, the plaintiff applies for an order of committal against the defendant for contempt of court for having failed to obey the order of the court whereby the defendant was required to disclose the whereabouts and full identity of each of his accounts whether within or without the jurisdiction.

Held, dismissing the plaintiff's motion:

(1) The order directs the defendant to disclose the whereabouts and full identity of his accounts whether they are within or outside the jurisdiction of the court. It is an order to do a certain act, which is governed by O 45 r 5(1).

(2) The order is defective for non-compliance with O 45 r 5(1) in the sense that the act which was required to be done did not specify the time within which it should be complied with. There was no subsequent order made to include the time or to extend it to enable the defendant to comply with the term of the part of the order. This failure makes the enforcement of the order defective and the defendant would be entitled to be discharged from the contemptuous act.

[Bahasa Malaysia summary

Dengan notis usul, plaintif memohon untuk perintah komital terhadap defendan kerana menghina mahkamah. Defendan telah gagal mengikut perintah mahkamah dalam mana defendan dikehendaki mendedahkan butir-butir lengkap tentang akaun-akaunnya samada di dalam atau di luar bidang kuasa dan di mana mereka berada.

Diputuskan, menolak usul plaintif:

(1) Perintah itu mengarahkan defendan mendedahkan butir-butir lengkap akaun-akaunnya samada di dalam atau di luar bidang kuasa mahkamah serta di mana mereka berada. Ia adalah satu perintah melakukan sesuatu, yang dikawal oleh A 45 k 5(1).

(2) Perintah itu tidak sempurna lantaran ketidakpatuhan dengan A 45 k 5(1) kerana perbuatan yang harus dilakukan itu tidak menyebut tempoh masa dalam mana perintah itu mesti dipatuhi. Tidak terdapat perintah berikutan yang dibuat untuk menyatakan tempoh masa atau untuk melanjutkan tempoh masa untuk membolehkan defendan mematuhi bahagian berkenaan dalam perintah itu. Kegagalan ini mengakibatkan perlaksanaan perintah itu tidak sempurna dan defendan harus dilepaskan daripada dakwaan menghina mahkamah.]

Legislation referred to
Rules of the High Court 1980 O 45 r 5(1)

S Kulasegaran for the plaintiff.
V Sithambaram for the defendant.

Cur Adv Vult

Mohamed Dzaiddin J: By this notice of motion the plaintiff applies for an order of committal against the defendant for contempt of court for having failed to obey the order of this court made on 1 December 1986. The relevant part of the said order states as follows:

> ... It is ordered that the defendant, Lew Wa Chow whether by himself his agent or attorney be restrained by an injunction from dealing with and/or disposing of all or any of his assets until after the disposal of this case or such other Order as this Honourable Court may make and it is further ordered that the defendant disclose the whereabouts and full identity of each of his accounts whether within or without the jurisdiction and that the defendant be at liberty to apply to set aside this order within 30 days of the date of this order and the costs of and incidental to this application be costs in the cause.

Clearly, the above order is a Mareva injunction restraining the defendant from dealing and/or disposing of the assets or removing them from the jurisdiction of this court. However, the complaint of the plaintiff against the defendant in this contempt proceeding concerned the second part of the said order, which is 'it is further ordered that the defendant disclose the whereabouts

and full identity of each of his accounts whether within or without the jurisdiction ...'.

I have taken time to consider the plaintiff's application, reading the affidavits of the parties and examining the submissions of counsel. Upon considering the submission of counsel, and bearing in mind that I must be satisfied beyond reasonable doubt that the defendant had disobeyed the said order, I discover that there is a flaw in the aforesaid order which calls for a further scrutiny. Needless to say, the defendant would be entitled to be discharged from the contemptuous act, if at the end of the day, I find that this flaw in the said order is fatal.

I shall now proceed to consider what I mean by a flaw in the aforesaid order. Upon reading the second part of the order, it is clear to me that it directs the defendant to disclose the whereabouts and full identity of his accounts whether they are within or outside the jurisdiction of the court. In essence, it is an order to do a certain act, which, to my mind, is governed by O 45 r 5(1) of the Rules of the High Court 1980. The rule states as follows:

> 5(1) Where —
>
> (a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, rule 5; or
>
> (b) a person disobeys a judgment or order requiring him to abstain from doing an act,
>
> then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means that is to say —
>
> (i) with the leave of the Court, an order of committal;
>
> (ii) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body;
>
> (iii) subject to the provisions of the Debtors Act 1957, an order of committal against that person or, where that person is a body corporate, against any such officer.

The effect of the above rule is clearly explained in *The Supreme Court Practice 1985* at para 45/5/1 at p 666 which states:

> This rule governs the methods for the enforcement by the Court of its judgments or orders in circumstances amounting to a contempt of Court. It applies to both positive and negative judgments or orders, those which require a party to do an act as well as those which require a party to abstain from doing an act, subject, however, to this important qualification, that the coercive methods of enforcement under this rule cannot be employed to enforce a judgment or order to do an act unless that act is required to be done, but is not done, within a specified time which has been fixed either by the original judgment or order, or by a subsequent order extending or abridging such time under O 3 r 5, or fixing such time under r 6.

Hence, in the present application I find that the second part of the said order is defective for non-compliance with O 45 r 5(1) in the sense that the act which was required to be done did not specify the time within which it should be complied with. Further, there was no subsequent order made to include the time or to extend it to enable the defendant to comply with the term of the part of the order. I should perhaps state here that I disagree with Encik Kulasegaran's submission that O 45 r 5(1) does not apply to the Mareva injunction or order. With respect, the commentary in *The Supreme Court Practice 1985* (White Book) quite clearly states that the rule applies to both positive and negative judgments or orders, ie those which require a party to do an act as well as those which require a party to abstain from doing an act. Thus, there is no doubt in my mind that the act upon which the defendant was required to do, ie to disclose the whereabouts and full identity of his account is a positive order.

For the above reasons, in my judgment, the failure of the plaintiff to specify the time for the defendant to comply with the said order or the absence of a subsequent order fixing or extending such time makes the enforcement of the said order defective. It is unfortunate that I have to dismiss this application on a technicality, so to speak. However, as this is a committal proceeding against an individual, I think the rule governing the enforcement by the court of its order must no doubt be strictly followed.

This decision shall also bind the parties in Civil Suit No 23-90-86. Both applications are dismissed with costs.

Applications dismissed.

Solicitors: *Ranjit, Thomas & Kula; Kumar, Sitham & Co.*

Reported by *Zarinah Marican*